

# ALTERNATIVE DISPUTE RESOLUTION

*Law & Practice*



*Edited by*

Adnan Yaakob

Ashgar Ali Ali Mohamed

Arun Kasi

Mohammad Naqib Ishan Jan

Muhamad Hassan Ahmad

**CLJ Publication**

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## CHAPTER

# 5

## NEGOTIATION: TYPES AND ETHICAL ISSUES\*

### Introduction

Negotiation is an alternative and yet peaceful means of resolving a dispute, which can be utilised by people or entities to settle their differences through compromise or agreement that would allow the parties to continue to maintain their mutually beneficial relationship after the resolution of their differences. Negotiation is a non-adjudicative, flexible, informal and confidential method that may be conducted bilaterally or multilaterally. An effective negotiation necessitates observance of certain ethical values by the negotiators including honesty, trust, fairness, etc., that would enable them to resolve their differences justly and fairly, and at the same time make sure that the relationship between the parties continue to flourish. The scope of this chapter does not cover all aspects of negotiation as it focuses only on the types of negotiation and its ethics.

### Types Of Negotiation

Basically, negotiation can be categorised into three major types such as competitive negotiation, accommodative negotiation, and collaborative negotiation. Each of these types has its own methods, skills and style; its own advantages and disadvantages; and wanting to reach an agreement that would settle differences in a given dispute. These three types of negotiation are discussed further in the following discourse.

---

\* This chapter is contributed by Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad.



### Competitive Negotiation

The approach in competitive negotiation is to treat the process as a competition that is to be won or lost. A competitive negotiator is a competitor who, like a football player, thrives on the cut and thrust and wants the biggest slice of the pie. He wants to win everything and he strives purposefully towards that until he makes sure he achieves his objectives, i.e., to get the biggest share of the pie and give the smallest to the other party to the negotiation. Albeit it seems that he has some advantages in the process of negotiation, a competitor negotiator may lose his temper agitating the other party and thus cause delay or a stalemate and may even escalate the dispute especially when the other side attacks his position. A good negotiator who would like to maintain a future relationship with the other side of the negotiation would normally avoid a stalemate or escalation of the dispute and make sure that he does not lose his temper and that his actions at least causes no delay to a negotiated settlement of the disputes.

A competitive negotiator is assertive and basically follows the distributive negotiation style. In a distributive negotiation or also known as zero-sum negotiation, the negotiator applies the competitive bargaining tactic in which one party gains something only when the other party loses. This tactic is used in negotiating the distribution of fixed resources, i.e., money, assets, etc., between the parties. It does not provide a win-win solution but rather makes one side win as much as they can and one side loses, *vice versa*, depending on their negotiation power, strength and skill. In this type of negotiation, each party will try their best to gain the maximum share out of the resources.

Therefore, the attitude of a competitive negotiator is so assertive, that he would expect his opponent to either concede or cease negotiation. This negotiator does not give much importance to the relationship with the other side, as he would normally display certain behaviour like suspicion, hostility, coercion and perhaps the use of tough language *vis-à-vis* the opponents. Generally, this type of negotiator talks more, does not listen to the opposite party and he does all these with the sole desire to win over the opponent to obtain the bigger share.<sup>1</sup>

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1 K Shonk 'What is Distributive Negotiation?' Harvard Law School 12 February 2019 at <https://www.pon.harvard.edu/daily> (accessed 27 July 2019).

A competitor is less worried about the future relationship. This type of negotiator is an individual who loves conflict and enjoys being assertive to win at all costs, thereby he suffers from the 'competitive arousal' or the 'illogical desire' to win. The determination to win and the love of conflict is so strong on the part of the competitive negotiator that he risks alienating his negotiating partner, team and colleagues. When the other side of the negotiating party is agitated by the irrational assertiveness of the competitive negotiator, he may then alienate himself from the negotiation and this may cause the collapse of the negotiation process or the negotiation may come to an end without a desired outcome. Accordingly, this competitive negotiation strategy may not be suitable to employ and certainly, the parties cannot afford to ignore each other with regard to the subject matter of the dispute between them. At least, the option for further negotiation will still be available between the parties.

### **Accommodative Negotiation**

The accommodative negotiation style is one of sacrifice, selflessness and harmonising in nature. An accommodative negotiator basically does not love conflict and tries to avoid it at all costs. He loves compromise and this makes him a nice individual negotiator that finds satisfaction in assisting others to get their needs met. He is not seeking to get the biggest slice of the pie but would rather search for a reasonable solution to the dispute that all parties are on par. He prefers cooperation over competition and his character is shaped by harmonious values, goodwill and reciprocity. By applying the tactic of the accommodative attitude, the negotiator may attract his opponents to give in to compromise. Therefore, the accommodative negotiator often feels that he gets more than he gives by taking the accommodative approach. This approach is best for the parties if their long-term relationship is more significant than the short-term gain.

The accommodative tactic is a proper form of negotiation to be used in the following situations:

- (1) When preserving or building the relationship is more important than winning the issue at hand.

- (2) When supporting the needs of the other party is feasible, appropriate and does not come at significant personal cost.
- (3) When a person realises that they are wrong and that the alternate position is better.
- (4) When competing will produce a negative outcome, like the other person is in a position of authority or power.
- (5) When a positive outcome is unlikely and it is better to end the dispute and move on.
- (6) When assisting someone to learn and grow from the outcome of their decision, even though it may differ from their own.
- (7) When restoring harmony during a tense moment or after a disagreement; and satisfying a complaint when in the process of providing customer service.<sup>2</sup>

Generally, an accommodative negotiator simply gives the other side too many concessions with the intention of strengthening the relationship between them in a short period of a negotiation. In doing so, he is neglecting his own needs in favour of helping the other side in getting their way. This type of negotiator also tends to avoid stress of conflict and appeases others. These attitudes put him in a weak position in the negotiation and is thus unable to achieve an outcome that is acceptable or fair to all parties. The inability to achieve a fair outcome emanates from lack of confidence, bargaining power and skills. It is essential for a successful negotiator to have the necessary knowledge, skill and confidence to argue and negotiate successfully with others and confront them if necessary, in order to attain a fair outcome.<sup>3</sup>

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2 D Eilerman 'Give and Take — The Accommodating Style in Managing Conflict' Resourceful Internet Solutions Inc August 2006 at <https://www.mediate.com/articles/eilerman> (accessed 27 July 2019).

3 *Ibid.*

## **Collaborative Negotiation**

Collaborative negotiation is a constructive and interest-based negotiation that treats the relationship between the disputing parties as an important and valuable element while seeking an equitable and fair agreement. A collaborative negotiator focuses on using problem solving methods to create value and discover mutually satisfactory solutions to a given dispute. This type of negotiator basically negotiates about 'what the problem is; how negotiating parties are going to work together; how the solution might be; and the final agreed goals for action'. In a collaborative negotiation, the negotiator basically takes an adversarial approach. A mediator can achieve his desired result successfully only when he knows well about the subject matter or issues involved in the dispute and the sensitivity of the relationship between the parties. A collaborative negotiator will not always compromise in order to sustain the relationship as in the case of accommodative negotiation, instead he generates new ideas and options in order to make sure a win-win solution is possible.

Collaborative negotiation, as opposed to confrontational negotiation, uses the win-win negotiation tactic and the collaborative negotiator may succeed in the negotiation if both disputing parties are also cooperative and join hands to come up with several possible solutions and later select the best solution. Generally, a collaborative negotiator focuses on finding a compromise that will make all disputing parties feel as if they got what they wanted, even if it is not exactly what they thought they wanted. Thus, it is crucial for a collaborative negotiator to listen to the wants, needs, fears, and concerns of all parties in the dispute. In any situation, a collaborative negotiator should avoid confrontation with any party to the negotiation.

In a collaborative negotiation, the negotiator also takes an integrative approach that allows parties with different opinions and interests to 'work together to develop and share information, analyse facts, develop common assumptions and use this information to reach an informed decision'. The main advantage of collaborative negotiation is that it makes all disputing parties feel valued and understood. In this way, they can avoid escalation of tension and misunderstanding; and feel free to

express themselves and listen to each other's viewpoints. One of the most common factors that make the negotiation fail is that negotiating parties are not ready to listen to each other, thereby leading to further misunderstanding.<sup>4</sup>

Albeit the collaborative negotiation gives room to the parties to merge their different ideas, formulate a win-win solution and maintain relationship between them, this approach is not free from shortcomings. The key disadvantage of this approach involves the amount of time required to collaborate effectively in order to obtain the desired result. This is because a successful collaborative negotiation requires effective listening, paraphrasing and communication and all of these are time consuming but, in spite of this, the outcome would be a fair, win-win solution to the problem that can make all the parties to the dispute content.<sup>5</sup>

### **Ethics In Negotiation**

Ethics can be defined as 'moral principles that govern a person's behaviour or the conducting of an activity'.<sup>6</sup> Fundamentally, a person has to observe ethical principles relevant to a particular act or behaviour that he does. In view of that, there are ethics for almost all types of conduct known to mankind including negotiation. Ethics is the foundation of doing the right thing, being honest and being fair to the parties in a negotiation. Although there are no established model standards of ethics in negotiating a dispute, the authors suggest that a profound person who acts as a third party negotiator in a dispute should possess the following ethical and moral values in order to conduct a fair and successful negotiation.

4 JR Ehrmann, BL Stinson 'Joint Fact-finding and the Use of Technical Experts' in L Susskind, S McKernan *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* (1999) pp. 375-398.

5 S Quain 'The Advantages & Disadvantages of Collaborating Conflict Management' at <https://smallbusiness.chron.com> (accessed 27 July 2019).

6 *Lexico* at <https://www.lexico.com/en> (accessed 27 July 2019).

### **Self-Determination Of The Parties (Party Autonomy)**

A negotiator should make sure that the parties to a negotiation can freely exercise self-determination in which the parties are allowed to seek for a voluntary solution to the dispute without any form of coercion from anybody. From the beginning of a negotiation, a third party negotiator should inform the parties that negotiation is consensual in nature and that he is just an impartial facilitator. Thus, any party to the dispute may withdraw from the negotiation at any time and the negotiator may not impose or force any settlement on the parties.

### **Negotiation Skills**

Generally, every human has some sort of inherent negotiation skills that are used daily in solving day-to-day challenges in life. However, a complex dispute may require a person who is more than just someone who knows basic negotiation. Therefore, a third party negotiator who negotiates complex disputes, should have the additional skills to negotiate the dispute to meet the reasonable expectations of the parties. During the course of negotiation, if a negotiator finds that he cannot conduct the negotiation competently, he should withdraw from it after informing the parties accordingly.

### **Confidentiality Of Information**

A third party negotiator should not compromise the confidentiality of all information available to him in the process of negotiation under any circumstances. Prior to the commencement of negotiation, a negotiator should explain to the parties the information that he would obtain in the process of negotiation, is completely confidential. He should not disclose any information on how the parties conducted the negotiation to any other person. He should not use confidential information obtained in the negotiation outside for any other purposes.

### **Impartiality Of Negotiator**

A third party negotiator must always conduct negotiation in an utmost impartial manner. He has to decline to negotiate between the parties if he cannot conduct the negotiation impartially. During the negotiation, he must always be careful about prejudice or lack of impartiality due to the personal characteristics, backgrounds, beliefs, or any other reason. It would be best for a negotiator to avoid any manner that appears to be either favouring or disfavours any party in the negotiation. A negotiator should also withdraw from the process, at any time, if he is unable to conduct the negotiation in an impartial manner.

### **Conflicts Of Interest**

The question of conflict of interest may arise from the involvement of a third party negotiator either in the subject matter of the dispute or in any kind of relationship between him and any party to the dispute. A negotiator should decline to negotiate if his involvement in the subject matter of the dispute or relationship with any party to the dispute makes him incapable of conducting the negotiation in an impartial manner.

### **Process Of Negotiation**

A third party negotiator must conduct the process of negotiation in accordance with the principle of self-determination, confidentiality and impartiality. During the process, he should promote honesty and mutual respect among all the parties concerned. He should provide enough opportunity for each party to participate fully in the discussions during the course of negotiation. He should also allow them to decide freely on the outcome of the negotiation. At the same time, he should not allow any party to conduct in an unethical manner or breach any law. If the negotiation fails for any reason or parties cannot reach a solution by way of negotiation, the negotiator may suggest to the parties to resolve the dispute via alternative dispute resolution mechanisms, i.e., mediation, arbitration, counselling, neutral evaluation, or any other process as appropriate, or even a court of law.

### **Fees For Negotiation**

If there is any fee charged for the negotiation service, it should be reasonable by taking into account, the complexity of the subject matter; the expertise of the negotiator; the time required; and the rates customary for such negotiation services in the field. All fees charged in connection with the negotiation should be in written form and explained to the parties for which the particular fee is being charged. A third party negotiator should not opt for a fee which is contingent upon the result of the negotiation or the financial amount of the settlement. Albeit a negotiator may accept unequal fees from the parties, it should not affect the ability of the negotiator to conduct the negotiation in an impartial manner on the basis of such difference in fees.<sup>7</sup>

Moral values can also be considered a quality that negotiators should possess. These values are important in negotiation as they help in enhancing the reputation of a negotiator, enabling him to gain the confidence of the parties and thereby, assisting the parties to reach an amicable settlement.

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<sup>7</sup> See the 'Model Standards of Conduct for Mediators 2005' prepared by the American Arbitration Association (AAA); the American Bar Association's Section of Dispute Resolution (ABA), and the Association for Conflict Resolution (ACR). See also the 'Standards of Conduct for Mediators in Court-Connected Programs 2000', adopted by the New Jersey Supreme Court.



## Conclusion

Negotiators, regardless of what types of negotiation they follow, i.e., competitive, accommodative or collaborative, should observe certain ethical values to ensure a just solution to their differences and, at the same time, maintain a good relationship between the parties that they would be able to continue to deal with one another in future. This is possible if negotiators follow some of the well established ethical or moral values in alternative dispute resolution mechanisms<sup>8</sup> discussed above as guidance with the intention to achieve a just, fair and amicable solution to the dispute.



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8 *Ibid.*

# ALTERNATIVE DISPUTE RESOLUTION

## *Law & Practice*

**Alternative Dispute Resolution: Law and Practice** is divided into 44 chapters which cover alternative dispute resolution (ADR) mechanisms in all their varieties, including negotiation, mediation, conciliation, ombudsman, arbitration, and court adjudication. These ADR mechanisms can be used alongside existing court systems and have gained widespread acceptance because of its speedy resolution of disputes and outcomes that preserve and sometimes even improve relationships.

The primary objective of this book is to enhance reader's understanding of the various regulatory framework governing ADR on diverse issues at both national and international levels. This includes the application of ADR to fintech, Islamic banking and finance, labour, and construction disputes among others. Online dispute resolution, Singapore Mediation Convention, and university arbitration are also featured in this book.

All those concerned, both the legal and non-legal community such as legal practitioners, arbitrators, mediators, academicians, and students, will find this book as a valuable aid for a good understanding of matters pertaining to ADR without having to refer to several other sources.

